Editor's note: appealed - aff'd, Civ.No. A76-115 (D.Alaska Jan. 14, 1983)

UNITED STATES
v.
EVELYN M. BUNCH (ON JUDICIAL REMAND)

IBLA 80-819 Decided June 10, 1982

Recommended decision of Administrative Law Judge L. K. Luoma after hearing on judicial remand, holding that application to purchase trade and manufacturing site AA 146 should be rejected.

Affirmed as modified.

1. Act of March 3, 1891 -- Alaska: Trade and Manufacturing Sites -- Applications and Entries: Generally -- Contests and Protests: Generally -- Conveyances: Generally -- Patents of Public Lands: Generally

   Although sec. 7 of the Act of Mar. 3, 1891, 43 U.S.C. § 1165 (1976), provides for issuance of a patent to an entryman upon a lapse of 2 years from the date of issuance of "the receipt," when no contest or protest of the entry is then pending, the 2-year period does not commence until issuance of the receipt evincing final payment of the purchase price of the land. When the statute was enacted, "the receipt" referred to what was known as "the final receipt of the Receiver," who was then an official of the General Land Office. The issuance of an interim receipt for payment of a $ 10 filing fee submitted with an application to purchase a trade and manufacturing site in Alaska does not trigger that statutory mechanism.

2. Alaska: Trade and Manufacturing Sites

   The use and improvement of land in a trade and manufacturing site for the pasturing of horses, the placement of advertising

signs for off-site businesses, or the presence of roads which merely cross the land to give access to other property, cannot serve to qualify the claimant to receive title to the site, as all those uses are controlled by other provisions of law and regulation, and are not cognizable as the conduct of "trade, manufacture, or other productive industry" on the site.

3. Alaska: Trade and Manufacturing Sites

Where the claimant to a trade and manufacturing site, which was located for the benefit of businesses being conducted on her husband's adjacent unpatented homestead, relinquishes approximately half the land and the primary improvements on the site so that those lands may be included in the survey of the homestead, her trade and manufacturing site purchase application must be rejected if the remaining lands are not actually occupied by improvements and used and needed in the prosecution of the businesses.

4. Alaska: Trade and Manufacturing Sites

One who is not the owner of the business enterprise which is to be served by activities conducted on a trade and manufacturing site is not a qualified claimant of the site.

Grewell v. Watt, 664 F.2d 1380 (9th Cir. 1982), distinguished.

APPEARANCES: Dennis Lazarus, Esq., Anchorage, Alaska, for the contestee; James R. Mothershead, Esq., Assistant Regional Solicitor, Anchorage, Alaska, for the contestant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

This case had its inception upon the filing of a "Notice of Location of Settlement or Occupancy Claim" for a trade and manufacturing ("T&M") site by Evelyn Marie Bunch, alleging occupancy beginning July 22, 1966. The notice stated that the claim was maintained or desired for "roadside business - 'tourist trade' catering to campers." The notice of location was filed in the Alaska State Office of the Bureau of Land Management (BLM) on August 3, 1966. The claim, as originally described by metes and bounds, allegedly comprised approximately 80 acres and was situated on the Glenn Highway at

Mile 170. 1/ A filing fee of $10 accompanied the notice of location, for which BLM issued receipt No. 27570.

On August 3, 1971, Evelyn Bunch filed an application to purchase the site, asserting that the land was used in connection with a guiding and outfitting business which was licensed and conducted in the name of Ken Bunch, her husband. The application was accompanied by a $10 filing fee, for which BLM issued receipt No. 275238.

On May 20, 1974, a compliance inspection of the site was conducted by a BLM land examiner. He reported that the primary use of the land was for an improved horse pasture. Part of the land had been cleared for open pasture, and, the report said: "The major capital improvements placed on the land consist of approximately 1 mile of barbwire and log jack fence which encloses a 5 acre clearing seeded to brome pasture." He also found three advertising signs along the highway right-of-way advertising Ken Bunch's flying service and Ken Bunch's guiding and outfitting service for hunters and fishermen, which businesses were being conducted on the adjacent Bunch homestead. Also noted were three gravel roads which led from the Glenn Highway across the T&M site, two of which provided access to the homestead land, the other being a public access road to the Tolsona Lake Lodge, not owned by the Bunch family. The only other improvement on the T&M site was a gravel ramp, situated in the bottom of an abandoned gravel pit, used to facilitate the loading and unloading of horses by truck.

By its decision of August 22, 1975, BLM rejected Evelyn Bunch's application to purchase and canceled the T&M site claim for the reason that the land was used principally as an improved pasture for horses, which BLM held to be an agricultural use which is nonqualifying.

On appeal to this Board, the BLM decision was affirmed. Evelyn M. Bunch, 25 IBLA 44 (1976). Although appellant argued that her use of the land as pasture was not agricultural because the horses maintained there were used as pack and saddle stock in the hunting and guide business, the Board held that it is the nature of the use of the land itself, not the purpose of the use or business to which it relates, that governs whether the use qualifies as a "trade, manufacture, or other productive industry" within the meaning of section 10 of the Act of May 14, 1898, as amended, 43 U.S.C. § 687a (1976), under which the site was claimed.

Evelyn M. Bunch then filed suit for judicial review of the Board's decision. The Court found that the Department should conduct an evidentiary hearing to elicit further facts relating to plaintiff's use of the T&M site, the specific nature of the improvements there, and the relationship between the use of the T&M site and the business with which such use was associated. By the Court's memorandum and order, the case was remanded to this Department with instructions to hold an evidentiary hearing and render a new decision on

1/ It subsequently appeared that the claim originally comprised about 55 acres, of which only approximately 30 acres remain as the subject of this proceeding.

the basis of that hearing. Bunch v. Kleppe, Civ. No. A 76-115 (D. Alaska, July 2, 1980). Administrative contest proceedings were then initiated by BLM.

The hearing was conducted at Glennallen, Alaska, on October 21, 1980, before Administrative Law Judge L. K. Luoma. Both sides were represented by counsel, witnesses were presented, exhibit evidence was received, a transcript was made, and the BLM administrative case record was included. With the agreement of both parties and the approval of this Board, Judge Luoma determined to write a recommended decision for submission to the parties and the Board, rather than writing an initial decision which would be subject to appeal to this Board by the party adversely affected. Posthearing briefs were supplied by each counsel, and on July 10, 1981, Judge Luoma prepared his recommended decision, which was served to each of the parties and submitted to this Board along with the entire record. The substance of the recommended decision will be addressed subsequently.

[1] First, however, we wish to consider and dispose of a motion filed by contestee while this case was pending before the Board.

On January 7, 1982, the Court of Appeals handed down its decision in Grewell v. Watt, 664 F.2d 1380 (9th Cir. 1982). In that case LaVonne Grewell had initiated a 5-acre homesite claim in Alaska pursuant to 43 U.S.C. § 687a (1976), the same statute with which we are concerned in the instant case. In July 1970 she had applied to BLM to purchase the site, sending the purchase price. More than 4 years later BLM initiated contest proceedings by mailing a copy of the contest complaint to her address of record in BLM. She had moved from that address more than 2 years before, and the complaint was returned to BLM by the post office as undeliverable. When she failed to respond to the complaint, BLM held the claim canceled and void. Grewell learned of this action in 1975 and, after exhausting her administrative remedy, filed suit in the District Court, which granted summary judgment in favor of the Secretary. The Court of Appeals, however, held that section 7 of the Act of March 3, 1891, as amended, 43 U.S.C. § 1165 (1976), barred the initiation of an administrative contest proceeding after 2 years and entitled the claimant to a patent conveying the entered land.

On the basis of the decision in Grewell v. Watt, supra, Evelyn M. Bunch has moved this Board to order that title to the T&M site be transferred to her, arguing that although she filed her application to purchase in August 1971, it was not rejected by BLM until August 1975. She asserts that in the Grewell case the Court measured the 2-year period in which a contest could be filed from the filing of LaVonne Grewell's application to purchase, and that the law applied in the Grewell case is applicable in her case. We disagree.

As originally enacted, the pertinent part of the 1891 statute read as follows, at 26 Stat. 1099:

> Provided, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be

> no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor. [Emphasis added.]

"[T]he date of issuance of the receiver's receipt," which initiates the running of the 2-year term referred to the final receipt of the receiver. In the General Land Office (now BLM) there were in each land office two officials of apparently equal rank with separate and distinct responsibilities, known, respectively, as the register and the receiver. The register was in charge of the land title and status matters, and, as the title suggests, the registry of entries and claims. The receiver received payments, fees, and commissions, and issued receipts therefor. When an entryman had accomplished all of the acts prerequisite to the issuance of patent, such as the submission of final proof, publication, etc., the register issued his "final certificate." When all of the monies incident to the transaction, including the purchase price, had been paid by the entryman, the receiver issued his "final receipt." The statutory reference to "the receiver's receipt" was changed to read "the receipt of such officer as the Secretary of the Interior may designate upon final entry" by Reorganization Plan No. 3, by which the General Land Office and the Grazing Service were merged and became the Bureau of Land Management. See 43 U.S.C. § 1165 (1976), Historical Note. Cash receipts are now issued by the accounting units in the various BLM state offices. United States v. Jack Boyd, Jr., 39 IBLA 321, 328 (1979). 2/

Nearly all of the judicial cases reported on the subject make it clear that the running of the 2-year period commenced with the issuance of the "final receiver's receipt." For example, in Work v. United States ex rel. Davis, 6 F.2d 690 (D.C. Cir. 1925), the Court noted that on May 23, 1917, relator "was given a final receiver's receipt and final register's certificate." In Lane v. Hoglund, 244 U.S. 174 (1917), the Court referred to the time for initiation of a contest as "within two years of the issuance of the final receiver's receipt." Identical language was again used by the Supreme Court in Payne v. United States ex rel. Newton, 255 U.S. 438 (1921).

A full and detailed exposition of the legislative history and the appropriate application of the proviso is contained in Stockley v. United States, 260 U.S. 532 (1923). Some excerpts from that opinion follow:

> The conceded facts are that in 1897 Stockley took possession of the land and on November 13, 1905, made a preliminary

2/ Suit for mandamus to compel the issuance of a patent to this T&M site was dismissed by the District Court. Boyd v. Andrus, Civ. No. 79-322 (D. Alaska Order Mar. 14, 1980). Appeal was dismissed by the Ninth Circuit, which found that the District lacked jurisdiction to consider the case on its legal merit. Boyd v. Watt, Civ. No. 80-3135 (9th Cir. Aug. 17, 1981). On Aug. 20, 1981, the District Court vacated its previous judgment, thus leaving intact the decision of this Board.

> entry thereof as a homestead. He complied with the provisions of the Homestead laws, submitted final proof, including the required non-mineral affidavit, paid the commissions and fees then due, and on January 16, 1909, obtained the receiver's receipt therefor.

260 U.S. at 536.

> * * * It must be assumed that Congress was familiar with the operations and practice of the Land Department and knew the difference between a receiver's receipt and a register's certificate. These papers serve different purposes. One, as its name imports, acknowledges the receipt of the money paid. The other certifies to the payment and declares that the claimant on presentation of the certificate to the Commissioner of the General Land Office shall be entitled to a patent.

260 U.S. at 538.

> * * * What the act meant upon its passage, it continued to mean thereafter. The plain provision is that the period of limitation shall begin to run from the date of the "issuance of the receiver's receipt upon the final entry." There is no ambiguity in this language and, therefore, no room for construction. There is nothing to construe. The sole inquiry is whether the receipt issued to Stockley falls within the words of the statute.

260 U.S. at 539.

> * * * It was in this sense that the term "final entry" was used in this statute. Having submitted to the proper officials proof showing full compliance with the law, and having paid all the fees and commissions lawfully due, Stockley had done everything which the law required on his part and became entitled to the immediate issuance of the receiver's receipt, and this receipt was issued and delivered to him. No subsequent receipt was contemplated or required. [Emphasis added.] From the date of the receipt the entry may be held open for the period of two years, during which time its validity may be contested. Thereafter the entryman is entitled to a patent and the express command of the statute is that "the same shall be issued to him." Lane v. Hoglund, 244 U.S. 174; Payne v. Newton, 255 U.S. 438.

260 U.S. at 540.

> * * * The purpose and effect of the statute are clearly and accurately stated by the Commissioner of the General Land Office in Instructions of June 4, 1914, 43 L.D. 322, 323, in the course of which it is said:
>
> > There is no doubt that Congress chose the date of the receiver's receipt rather than of the certificate of the register as controlling, for the reason

> that payment by the claimant marks the end of compliance by him with the requirements of law. It would be manifestly unjust to make the right to a patent dependent upon the administrative action of the register, subjecting it to such delays as are incident to the conduct of public business and over which the claimant has no control. Payment, of which the receiver's receipt is but evidence, is, therefore, the material circumstance that starts the running of the statute, inasmuch as a claimant is and always has been entitled to a receipt when payment is made." [Emphasis added.]

260 U.S. at 541.

From the foregoing, there can be no doubt that the 2-year period does not commence until issuance of the final receipt of the receiver, or, in the modern context, the final receipt "of such officer as the Secretary * * * may designate." The "final receipt" evinces the full and final payment of the entryman of all monies due the United States, so that "no subsequent receipt [is] contemplated or required." Id.

In deciding Grewell v. Watt, supra, the Ninth Circuit conformed to the decision in Stockley v. United States, supra, which it cited. Although in Grewell no great point of the fact was made, it was established in the second sentence of the Court's opinion that at the time LaVonne Grewell submitted her application to purchase, she also sent in the purchase price of the land. Presumably, a final receipt was issued by the appropriate BLM officer, but even in the unlikely event a receipt was not issued it would have made no difference because, as stated in the Stockley opinion, supra, "Payment, of which the receiver's receipt is but evidence, is, therefore, the material circumstance that starts the running of the statute, inasmuch as a claimant is and always has been entitled to a receipt when payment is made."

The distinction between Grewell v. Watt, supra, and the case at bar lies in the fact that Evelyn M. Bunch has never paid nor tendered to BLM the purchase price of the land claimed, and nothing which could be considered a "final receipt" has issued to her or is due her. A "subsequent receipt" would be "contemplated and required" in her case only upon final payment. Stockley v. United States, supra. Although contestee asserts that the statute began to run with the filing of her application to purchase the T&M site, to quote again from Stockley v. United States, supra:

> The plain provision is that the period of limitation shall begin to run from the date of the "issuance of the receiver's receipt upon the final entry." There is no ambiguity in this language and, therefore, no room for construction. There is nothing to construe. The sole inquiry is whether the receipt issued * * * falls within the words of the statute.

260 U.S. at 539. Here, the contestee paid a $10 filing fee to BLM upon the filing of her notice of location of her T&M site claim, for which a receipt issued, and a second $10 "service fee" upon the filing of her application to

purchase the claim, for which a second receipt issued. Still unpaid is the statutory purchase price of the land. Neither of the two receipts issued to date "falls within the words of the statute." Moreover, because the amount of land in the claim cannot be ascertained without a survey, it would not have been possible for her to pay the correct amount, or for the officer designated to issue a receipt evincing final payment, until the number of acres in the claim was known. This uncertainty has been compounded by the contestee's voluntary relinquishment of "those portions of my T&M site AA-146 that are in conflict with his [her husband's] Homestead A-062714" (Contest Exh. 9). This voluntary partial relinquishment by contestee in favor of her husband's overlapping homestead boundaries was made on October 3, 1978, more than 5 years after the filing of the purchase application in 1972, a clear indication of the absence of any "finality" of the claim at that time. In any event, absent payment of the purchase price required by 43 U.S.C. § 687a (1976), and a BLM final receipt, the 2-year period of limitation provided by 43 U.S.C. § 1165 (1976) has not commenced.

Therefore, contestee's motion for recognition of her alleged entitlement to a patent is denied.

[2] The hearing conducted on remand from the District Court served to confirm in greater detail what the BLM examiner had previously reported concerning the improvement and use of this T&M site claim, namely, a fenced and cleared horse pasture, about 5 acres of which was planted to forage grass, a gravel ramp for loading and unloading horses, three signs on the highway right-of-way advertising Ken Bunch's air taxi service and his guide and out-fitter business, two roads which merely crossed the T&M site to give access to the homestead land, and one road which gave public access to Tolsona Lake and Tolsona Lake Lodge, a place of public accommodation, which was not a business belonging either to Ken or Evelyn Bunch.

All of the improvements and uses of the site were covered under other provisions of law and regulation. The sole and exclusive legal authority to use public land for the pasturing of horses is the Alaska Grazing Act, 43 U.S.C. § 316 (1976). The grazing of livestock has been consistently held to be an agricultural use of land, and therefore an inappropriate use of a T&M site. In John G. Brady, 26 L.D. 305 (1898), shortly after the settlement act authorizing T&M sites was passed, the Department held that Congress did not intend to authorize a trader or manufacturer in Alaska to acquire, as incident to his business, any land for the growing of hay or the grazing of stock, saying:

> There is no provision of law whereby title may be acquired to public lands in Alaska for the purpose of growing fruit, wild or domestic, or of raising any agricultural crop, such as grain, or hay, or of grazing thereon horses or cattle. Such pursuits are horticultural and agricultural in their nature and are not within the meaning of the words "trade or manufactures." The horticulturist or agriculturist is not regarded as a tradesman, nor does his pursuit class him with the trader or manufacturer in the general and ordinary acceptation of these words. Neither does the language of the act of 1891 warrant the conclusion that

> it was the intention of Congress to authorize the trader or manufacturer in Alaska to acquire, as incident to his business, any land in that district for raising hay, grazing, or fruit-growing purposes, for which purposes, as it would appear, claimant has entered, and now asks patent to the major part of the land he claims. [Emphasis added.]

Id. at 308. See also Alfred Packennen, 26 L.D. 232, 236 (1898).

While exceptions to this rule have been identified in two instances, each case involved use of the T&M site land as a temporary holding area for cattle which were being industrially processed as part of a business or industry actually conducted on the T&M site. In Lloyd Schade, 12 IBLA 316 (1973), rev'd on other grounds, 638 F.2d 122 (9th Cir. 1981), the Board recognized the need for land as a holding area for cattle awaiting slaughter at the slaughterhouse which was operated on the T&M site; the slaughterhouse clearly being a "productive industry." In Omar Stratman, 16 IBLA 222, 227-28 (1974) (Stuebing, A.J., concurring in part), this writer opined that the feedlot which was the business being operated on the T&M site was not an agricultural use of the land, despite the maintenance of live cattle there, saying, "In my opinion, feedlots, stockyards, slaughterhouses and packing plants are 'industries' for the processing of an agricultural product." After judicial remand for an evidentiary hearing, Stratman v. Dept. of the Interior, Civ. No. A 74-103 (D. Alaska May 6, 1976), this Board agreed that it was. United States v. Stratman, 37 IBLA 352 (1978), aff'd, Civ. No. A 74-103 (D. Alaska Aug. 7, 1979).

But Lloyd Schade, supra, and Omar Stratman, supra, are easily distinguishable from a situation such as this, where the owner of livestock simply desires land on which to pasture his animals. In both Schade and Stratman the business activity which constituted the "trade, manufacture, or other productive industry" was actually conducted on the respective sites, and the presence of livestock there was simply a necessary incident to the conduct of those particular businesses. In this case, however, the guiding and outfitting business is conducted on other land and cannot serve to qualify contestee's claim to the T&M site. Counsel for contestee argues that Bunch's use of the site as horse pasture was "not agricultural in nature but 'necessary first steps' in this productive industry of guiding. The horses were used in this productive industry of guiding. The end result was guiding and not agricultural purposes" (Contestee's posthearing brief at 2; transcript citations omitted). This is unpersuasive. By analogy, if contestee operated a flour mill and a bakery elsewhere, counsel presumably would argue that she could qualify for the T&M site by planting a wheat field on the site because the "end result" was milling and baking, not agriculture. The pasturing of livestock is essentially an agricultural endeavor, regardless of whether the animals are utilized as draught stock, or saddle stock, or for food, for fiber, hides, or simply as pets, as ably demonstrated by the brief of the Assistant United States Attorney before the District Court in this case (pages 7-13). See 3 C.J.S. Agriculture § 2 (1973). The fact that most agricultural products are eventually utilized in some form of other trade, manufacture or industry does not alter their basic agricultural character. Inasmuch as the pasturing of livestock is provided for under the Alaska Grazing Act, supra,

as the Bunches were well aware, 3/ and because grazing and animal husbandry have been held to be nonqualifying uses of a T&M site since the T&M site statute was enacted, it is clear that the use and improvement of this land as pasture does not entitle the claimant to a patent.

Similarly, the access roads which cross the T&M site are nonqualifying. Of the three roads, the one leading to Tolsona Lodge was built in 1965 by persons other than the Bunches before the T&M site was even located; another, leading to the Bunch homestead, was constructed by Ken Bunch in 1965, also before Evelyn Bunch located the T&M site; the third was built in 1969 across the middle of the T&M site to provide additional access to the homestead. As we noted in our initial decision at 25 IBLA 47, n.2:

> 2/ Congress has provided separate authority for the acquisition of rights-of-way and access to claims and private inholdings. See, e.g., Act of July 26, 1866, 43 U.S.C. § 932 (1970); Solicitor's Opinion, 66 I.D. 36., 363 (1959); 43 CFR Part 2920. An access route is generally not patented to a locator except as an integral physical part of the improved site. Cf. Lavina Jo King, 17 IBLA 309, 311 (1974). Protection of appellant's use is not an issue in this case. [Emphasis in original.]

See also, United States v. Rogge, 10 Alaska 130, 152 (1941), aff'd, 10 Alaska 307, 128 F.2d 800 (9th Cir. 1942), cert. denied, 10 Alaska 325, 317 U.S. 656 (1942), wherein it was asserted that a road could be established as a highway under R.S. 2477 (43 U.S.C. § 932 (1970)) even though it reaches but one property owner since he has a right of access to other roads and the public has a right of access to him. Thus, the location of the T&M site was unnecessary to, and unrelated to the creation of the roads, and the preservation of the T&M site is unnecessary to the preservation of access to the other properties.

The three advertising signs placed on the T&M site likewise were subject to other provisions of law and regulation. All three signs were situated within the Glenn Highway easement established by Public Land Order (PLO) No. 1613 (23 FR 2316 (Apr. 11, 1958)) pursuant to the Act of August 1, 1956; 43 U.S.C. §§ 971a-971e (1976). Paragraph 6 of PLO 1613 invoked section 3 of the Act of August 1, 1956, to require that lands within the highway easements "shall not be occupied or used for other than the highways, telegraph line and pipeline * * * except with the permission of the Secretary of the Interior * * *." (Emphasis added.) Provision is made in the Department's

3/ Interestingly, our second Stratman decision was decided only 3 days after our decision styled Kenneth H. Bunch, 37 IBLA 346 (1978), of which we take official notice pursuant to 43 CFR 4.24(b). Our opinion in that case relates in considerable detail his use of land in a rejected headquarters site for the grazing of his horses, his giving of cabins there to his wife, who then located the land as a mining claim, his efforts to acquire a grazing lease in the Big Bend Lakes area from BLM and by assignment from one who already held a Federal grazing lease, and the occupancy trespass charge filed against him by the BLM's Glennallen Area Manager as the result of these activities.

regulations for the granting of special land use permits for advertising displays. 43 CFR Subpart 2921. The regulations implement the Federal Highway Beautification Act of 1965, as amended, 23 U.S.C. § 131 (1976), for control of such advertising in the Federal highway system, as does State of Alaska legislation prohibiting outdoor advertising of certain kinds (AS § 19.25.090). In this context, the testimony of Ken Bunch is particularly informative:

> MR. LAZARUS: Which road are you referring to?
>
> A. The Glenn Highway. And, these signs that we had up were on the right of way and the State of Alaska said that they were to be removed and we weren't timely enough in removing them and they removed them for us.

(Tr. 193).

Again, the erection of advertising signs on Federal land, and especially along Federal aid highways generally, and this particular highway specifically, is controlled by law and regulation. The location of a T&M site for the purpose of installing advertising signs which advertise an off-site business in disregard of the governing statutes and regulations cannot serve to qualify the claimant to receive title to the public land involved. Even assuming arguendo, that the signs had been lawfully placed on the land, they still would not constitute the conduct of "trade, manufacture, or other productive industry" on the premises.

It thus appears that the devotion of the land to horse pasture, and to the unlawful erection of advertising signs, and the crossing of the land by roads giving access to other properties, were all uses which are regulated and permitted under provision of statutes and regulations other than the Act of May 14, 1898, under which contestee claims entitlement.

[3] Finally, since our initial decision in this case was rendered in 1976, the area of the claim, the nature of use, and the improvements remaining within the revised claim boundaries have been altered significantly. As previously noted, the homestead entry of Kenneth Bunch adjoined the subject T&M site of his wife. Apparently there was a considerable conflicting overlap of lands embraced by the homestead and the T&M site. This was resolved by BLM to the evident satisfaction of both Evelyn Bunch and Kenneth Bunch by including all of the land in conflict within the survey of the homestead (Tr. 161). Evelyn Bunch executed a relinquishment of all that portion of the T&M site in conflict with her husband's homestead, so that he might obtain patent to it (Exh. 29; Tr. 66, 67). Thereby, the T&M site was reduced by 26 to 33 acres, and now comprises "approximately 30 plus-or-minus acres." Eliminated from the T&M site and included in the homestead was the 15+ acres of fenced pasture area, except for 4 or 5 acres, and the western access road. All that remains in the reduced T&M site is the gravel pit (not a Bunch improvement) with the improvised horse-loading ramp at the bottom, the sole remaining advertising sign, the two access roads which cross the property to the homestead and Tolsona Lake Lodge, respectively, and the 4- to 5-acre remaining portion of the fenced pasture. Even were we to construe the original uses and improvements of the T&M site as qualifying, which we have already held were not, the area of primary use has now been included in the Bunch

homestead. The land remaining in the T&M site is neither improved, used, nor needed in the business enterprises being conducted by the Bunch family on the homestead land and elsewhere. We have repeatedly held that an applicant for a T&M site can only obtain title to that land within his claim "as is actually occupied by improvements and used and needed in his business." David A. Burns, 30 IBLA 359, 369 (1977); Golden Valley Electric Association, 8 IBLA 386 (1972); Clayton E. Racca, 72 I.D. 239 (1965), and cases cited therein. We conclude that the residual portion of the T&M site is not occupied, improved, or needed in the Bunch businesses.

Judge Luoma's recommended decision found, as we have, that (1) the advertising signs were unlawfully erected; (2) the two access roads constructed before the land was located as a T&M site are nonqualifying, and that the third road is not "improvement and use" sufficient to qualify a T&M site; and (3) that the patenting of the residual land and improvements remaining in the T&M site claim after relinquishment of 26 to 33 acres for inclusion in the homestead survey would violate the requirement that a claimant must not obtain more land than is actually improved and needed for trade, manufacture, or other industrial purposes. In addition, Judge Luoma held that the contestee, Evelyn Bunch, is not the owner of the businesses which allegedly are served by use of the T&M site, as all the advertising materials, business licenses and guiding contracts are held in the name of her husband. Judge Luoma further noted that the testimony at the hearing tended to establish that Ken Bunch was the owner, and that Evelyn Bunch's role was that of an expediter and secretary who performed many valuable services that employees might perform, but that Ken Bunch's testimony was that he is the owner of the business and makes the final decisions. Judge Luoma, therefore, held that because the T&M site law does not allow one to claim and occupy a T&M site for the benefit of a business owned by another, Evelyn Bunch was not qualified to claim this land for the benefit of her husband's business. At best, Judge Luoma said, her claim might be valid only if initiated under the headquarters site law which authorizes the patenting of up to 5 acres as a headquarters site to a person "whose employer is engaged in trade, manufacture or other productive industry." 43 U.S.C. § 687a (1976).

Although the question of whether Evelyn Bunch may be considered an "owner" of the business is a close one, we are of the opinion that the weight of the evidence supports the finding of Judge Luoma. Were it not for the marital relationship between Kenneth and Evelyn Bunch, there could be no doubt that she functioned only as an employee in the businesses owned and operated by him. The operations were conducted in his name, the business licenses were in his name (Tr. 150), all advertising was done in his name (Exh. 2, Tr. 163-64), he personally testified twice without reservation or qualification that he was the owner of both Sportsman Flying Service and Ken Bunch Guide and Outfitters (Tr. 163-64), all contracts were executed in his name and when his wife completed contracts she signed his name to them (Tr. 165), and he made all final decisions regarding business policy (Tr. 165). Ken Bunch also testified that he did not personally file on the subject land as a T&M site to be used in connection with his guiding business, "Because I wanted Evelyn to have something in her name. In her * * * as her own. Just because she's a woman, that doesn't mean she doesn't have a right to own things" (Tr. 171).

In this context it is noteworthy that in addition to the subject T&M site and adjoining Bunch homestead, Evelyn Bunch has a headquarters site at High Lake used in connection with the air taxi business (Tr. 166-67, 170), Ken Bunch has a T&M site at Tolsona Lake (Tr. 167), and Ken Bunch filed for a headquarters site at Dent Lake, but the filing was not accepted by BLM. An applicant for a T&M site "[m]ust show that * * * he has not theretofore applied for land as a trade and manufacturing site. If such a site has been applied for and the application has not been completed, the facts must be shown." 43 CFR 2562.2.

In summary, we find (1) that Evelyn M. Bunch is not entitled to a patent under the provisions of 43 U.S.C. § 1165 (1976); (2) that the nature of the occupancy, use and improvement of the T&M site are nonqualifying even if Evelyn Bunch could be considered an owner of the businesses with which the site is associated; (3) Evelyn Bunch is not an owner of those businesses; (4) that even if she were an owner of the businesses, and even if the occupancy, use and improvements on the site could have been considered to be qualifying, her relinquishment of 26 to 33 acres and the incorporation of that land, and its improvements, into the Bunch homestead left nothing remaining in the T&M site which could be regarded as land actually occupied by improvements and used and needed in the prosecution of the businesses.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the contestee's application to purchase the T&M site is rejected in its entirety.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Bruce R. Harris
Administrative Judge